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**TRANSNATIONAL FORCE OF LAW**

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## Non-financial Reporting for business enterprises

### *An effective tool to address human rights violations?*

SEBASTIAN EICKENJÄGER

Between 2005 and 2008, world food prices rose by 83 per cent, maize prices almost tripled, wheat prices increased by 127 per cent, and rice prices by 170 per cent.<sup>1</sup> The Food and Agriculture Organization of the United Nations (FAO) estimated that in 2008 more than 40 million additional people were pushed into hunger as a consequence of the food crisis,<sup>2</sup> and in 2009 the FAO stated that for the first time since 1970, more than one billion people in the world were suffering from hunger.<sup>3</sup> In 2011, global food prices reached another peak and in 2013 the FAO declared that there had been progress in the last years but 'it is insufficient overall to achieve the hunger reduction goals'.<sup>4</sup>

At the same time, the financial sector experiences a boom in the trade of raw materials on global financial markets, that is, a boom in the trading in commodity derivatives. The share of agricultural commodities within capital investments in raw materials increased to one fourth, about 100 billion US dollars. From 1998 to 2008 the investment volume in commodity index funds increased from 3 to 174 billion US dollars.<sup>5</sup> In general, the participation of speculators and non-traditional investors (e.g., hedge funds and large banks) at the commodity futures exchanges increased rapidly and turned traditional actors into a minority.<sup>6</sup> Speculation on agricultural commodities leads

<sup>1</sup> Mittal, 'The 2008 Food Price Crisis', p. 1.

<sup>2</sup> Food and Agriculture Organisation of the United Nations (FAO), 'Number of Hungry People Rises to 963 Million'.

<sup>3</sup> FAO, 'The State of Food Insecurity in the World 2009', p. 4.

<sup>4</sup> FAO, 'The State of Food Insecurity in the World 2013', p. 9.

<sup>5</sup> Oxfam Germany, 'Mit Essen Spielt Man Nicht!', p. 7.

<sup>6</sup> For an overview of the participating market actors and the changes at the commodity future exchanges see United Nations Conference on Trade and Development (UNCTAD) and Arbeiterkammer Wien, 'Price Formation in Financialized Commodity Markets: The Role of Information', pp. 18–9.

to a 'financialization'<sup>7</sup> of the agricultural trade markets. Many non governmental organisations (NGOs) and some scientists argue that this 'financialization' is one cause for extreme fluctuations and an increase of food prices that has serious impacts on the urban and rural poor in Low Income Food Deficit Countries (LIFDC) or the poorest development countries.<sup>8</sup> Olivier De Schutter, UN Special Rapporteur on the right to food, stresses the 'negative effects of speculation on basic food commodities' and highlights that 'a significant portion of the increases in price and volatility of essential food commodities can only be explained by the emergence of a speculative bubble'.<sup>9</sup>

The alleged impacts of food speculation on world hunger are exemplary for complex correlations between business and human rights in times of globalisation. Human rights violations often cannot be traced back to a specific business action. They often appear as violations that are systemic or of a structural nature. Therefore, they are to be identified in complex constellations between the economic system and communities or parts of a regional/global population.

With respect to the relation between the global trade of agricultural commodities at the financial markets and world hunger, the 'colliding regimes' shall be explicitly identified: On the one hand there is the urban and rural poor population in the poorest development countries who suffer from a violation of their right to food, and on the other hand there are profit-oriented business enterprises that take part in financial affairs that may have negative impacts on the social, cultural, and economic rights of the affected groups and individuals. Therefore, a conflict can be identified between the economic system and economic, social and cultural rights of communities, groups and individuals.

This paper examines the question whether the voluntary mechanism of Non-financial Reporting (NfR) is able to manage regime collisions between the economic system and global (social, cultural, and economic) human rights. The following sections will introduce this mechanism as it is meant to operate and then look at a practical example in a case study on food speculation. The paper will then address shortcomings of NfR in

<sup>7</sup> For a definition of the term/phenomenon 'financialization' see United Nations Conference on Trade and Development (UNCTAD) and Arbeiterkammer Wien, 'Price Formation in Financialized commodity markets: The Role of Information', pp. 13ff.

<sup>8</sup> See Oxfam Germany, 'Mit Essen Spielt Man Nicht!', pp. 7, 13ff. For the impacts of high food prices on the rural and urban poor population see Ivanic and Martin, 'Implications of Higher Global Food Prices for Poverty in Low Income Countries'.

<sup>9</sup> De Schutter, 'Food Commodities Speculation and Food Price Crises', pp. 1, 8.

practice and outline its potential before concluding with a discussion of ways for further development.

### Non-financial Reporting

Because of their complexity, these regime collisions pose an enormous challenge to transnational human rights protection. In the last two decades there has been much effort to establish human rights protection as a core business concern and to tie business actors to human rights obligations. There are many initiatives and approaches on the national, regional, international and transnational level, which aim to make corporations accountable for human rights abuses. Still, besides the question if corporations should be legally bound by human rights, questions regarding the means and extent of a direct obligation remain highly controversial. While the international community failed to implement a UN-based treaty regarding general human rights obligations of private actors,<sup>10</sup> there are many UN-based, state-based or private undertakings that aim to hold corporations accountable<sup>11</sup>. These instruments have in common that they operate on a 'voluntary basis' and that they do not contain legally binding provisions for business enterprises.

One instrument of increasing attention is the concept of NfR.<sup>12</sup> NfR can be best described in contrast to financial Reporting (fR): While fR's

<sup>10</sup> UN Economic and Social Council (ECOSOC), Sub-Commission on Promotion & Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003. For the drafting process and the reasons for the failure to adopt the 'draft norms' see Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law'; Kinley and Chambers, 'The UN Human Rights Norms for Corporations: The Private Implications of Public International Law'; Weißbrodt and Kruger, 'Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights'.

<sup>11</sup> Some of the most prominent instruments are the Guidelines of the Organisation for Economic Co-operation and Development (OECD) regarding the duty of multinational corporations (Guidelines for Multinational Enterprises), the Tripartite Declaration of the International Labour Organization (ILO) concerning multinational enterprises and social policy, the Global Compact program of the UN, and finally the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' proposed by the UN Special Representative John Ruggie.

<sup>12</sup> Also known as social accounting, social and environmental accounting, corporate social reporting, corporate social responsibility reporting, and non-financial accounting.

purpose is to deliver financial information of a company in the form of a balance sheet or an annual financial report to shareholders, lenders and the tax authority, NfR can be described as a process of communicating information on social and environmental impacts and effects of business conduct to interested stakeholders. The report itself can take the form of an annex to the annual financial report, a sustainability report or a stand-alone human rights report. The European Commission assumes that the global number of non-financial reports per year increased from almost zero in 1992 to approximately 4,000 in 2010.<sup>13</sup> Still, while 80 per cent of the world's 250 largest companies report on their sustainability, about 94 per cent of the total nearly 42,000 EU 'large' companies currently do not disclose non-financial information.<sup>14</sup>

NfR in general has its origin in the concept of Corporate Social Responsibility (CSR) and the traditional fR approaches.<sup>15</sup> There are many global initiatives that deal with NfR.<sup>16</sup> The best known private initiative in the field of NfR is the Global Reporting Initiative (GRI).<sup>17</sup> Another initiative that recently gained widespread attention is the Reporting and Assurance Frameworks Initiative (RAFI).<sup>18</sup> All of these reporting initiatives have in common that their aim is to assist companies in the preparation of reports on non-financial information. Therefore, they offer reporting frameworks – also called reporting standards, reporting schemes or guidelines – that guide the companies in creating

<sup>13</sup> European Commission, Impact Assessment, SWD(2013) 127 final, (16 April 2013), p. 10.

<sup>14</sup> Ibid.

<sup>15</sup> For further information on origin, main actors, and used terminology see v. Wensen, Broer, Klein, and Knopf, 'The State of Play in Sustainability Reporting in the EU', pp. 14ff.

<sup>16</sup> On the global level there are initiatives, offered both by non governmental organisations (NGOs) and intergovernmental organisations (IGOs), which are completely voluntary like the OECD Guidelines for Multinational Enterprises, the ISO 26 000, ILO Tri-partite Declaration of Principles concerning Multinational Enterprises and Social Policies, the UN 'Protect, Respect and Remedy' Framework on Business and Human Rights proposed by the UN Special Representative John Ruggie and the Global Reporting Initiative (GRI).

<sup>17</sup> For information on aims, structures, and practices of the GRI see the GRI's homepage, [www.globalreporting.org](http://www.globalreporting.org). For the history of GRI, internal organisation, and major actors within the GRI framework see Brown, de Jong, and Levy, 'Building Institutions Based on Information Disclosure'.

<sup>18</sup> RAFI is a three-year initiative that aims to, inter alia, develop a framework for good reporting on the basis of the UN Guiding Principles. For further information on the participating organisations and RAFI's core drafts and documents see [www.ungpreporting.org/](http://www.ungpreporting.org/).

a report and disclosing relevant information.<sup>19</sup> Most of the initiatives, like the GRI and RAFI, follow a so-called multi-stakeholder approach, i.e., the initiatives create and improve their reporting frameworks by involving all relevant stakeholders, like corporations, investors, rating agencies, auditors, scientists, and NGOs in the process of development.

The frameworks are subdivided into different sections. The different sections usually refer to information regarding, for example, the organisational profile of the organisation, governance and policy aspects, strategies for accessing impacts and to integrate findings of impact assessments into its performance and questions relating to remediation processes concerning affected individuals or communities.<sup>20</sup>

While all of the initiatives dealing with NfR are strictly ‘voluntary’<sup>21</sup>, there are many countries that have passed more or less mandatory NfR legislation.<sup>22</sup> In October 2014, the EU passed a directive that aims to harmonise existing national NfR legislation and establish it where member states have not yet passed regulation in this field.<sup>23</sup> The EU’s

<sup>19</sup> The most used reporting schemes are the Guidelines of GRI and the United Nations Global Compact Communication on Progress (UNGC COP). Beside that, there are many other standards which partially only refer to special business sectors like the Carbon Disclosure Project (CDP) and the Connected Reporting Framework (CRF) (for further initiatives see v. Wensen, Broer, Klein, and Knopf, ‘The State of Play in Sustainability Reporting in the EU’, Appendix C, pp. 135ff.).

<sup>20</sup> See RAFI, ‘Draft UN Guiding Principles Reporting Framework’; GRI, ‘G4 Sustainability Reporting Guidelines’.

<sup>21</sup> On the international level there are voices that on the one hand demand universal initiatives and on the other hand strive for legally binding approaches and standards. On the UN level, the outcome document of the UN Conference on Sustainable Development (Rio +20) calls for a universal framework on non-financial-reporting (General Assembly, (2012), UN Doc A/RES/66/288, paragraph 47.). The latest report of the United Nations Secretary General’s High-level Panel on Global Sustainability argues for a mandatory reporting framework (General Assembly, (2012), UN Doc A/RES/66/700, paragraph 166.).

<sup>22</sup> For example The Netherlands, Belgium, Denmark, United Kingdom, Finland, Spain, France, and Sweden. For a brief summary on the recent developments in some of these member states see European Commission, Impact Assessment, SWD(2013) 127 final, (16 April 2013), Annex III, pp. 49ff.; for references to the corresponding legislation see European Coalition for Corporate Justice (ECCJ), ‘Principles & Pathways: Legal opportunities to improve Europe’s corporate accountability framework’, p. 11, fn. 5.

<sup>23</sup> European Parliament and the Council, Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330/1 of 15 November 2014. The EU’s Directive requests mandatory NfR without providing explicit enforcement or sanctions for violations of the obligations. It also aims to unburden small and medium sized companies. According to this, the new EU’s Directive provides that only

directive itself offers no reporting guidelines or standards for the disclosure of non-financial information.<sup>24</sup> It states specific matters that shall be the minimum-content of the reports like environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. Besides that, it names criteria that shall be subject to the reports:

- (a) a brief description of the undertaking's business model;
- (b) a description of the policies pursued by the undertaking in relation to the matters, including due diligence processes implemented;
- (c) the outcome of those policies;
- (d) the principle risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts to those areas, and how the undertaking manages those risks;
- (e) non-financial key performance indicators relevant to the particular business.<sup>25</sup>

To guarantee the disclosure of this information, the Directive instructs the EU Member States to provide that companies rely on national, Union-based or international frameworks like, for example, the GRI.<sup>26</sup>

There is a consensus among civil society, governments, companies and their stake- and shareholders that NfR can be a useful management tool, an important risk management mechanism and a crucial source of information for affected communities, groups, and other shareholders that aim to assess the impacts of business' activities.<sup>27</sup> Furthermore, there is a growing demand of government agencies, investors, stock exchanges, and other financial institutions for transparency regarding a company's

undertakings that are public-interest entities with more than 500 employees should be subject to the new requirements. European subsidiary companies or parent companies, which are also subsidiary companies, shall only be exempt from non-financial reporting obligations if they and their subsidiaries are consolidated in the reports of another company.

<sup>24</sup> Under Art. 2 of the Directive, the European Commission is advised to prepare 'non-binding guidelines on methodology for reporting non-financial information' by 6 December 2016.

<sup>25</sup> Directive 2014/95/EU of 22 October 2014. <sup>26</sup> Ibid.

<sup>27</sup> See European Coalition for Corporate Justice (ECCJ), 'EU Legislation on Non-financial Reporting by Companies', p. 2; Amnesty International, 'Non-Financial Reporting: Amnesty International Position Paper'.

'human rights performance'. That is why, besides the promotion of responsibility and transparency, efficiency of capital markets and the performance of companies are major concerns and objectives of NfR.<sup>28</sup> For these reasons, next to affected communities, groups or individuals, NGOs, the media, consumers, employees and trade unions, it is also investors and analysts who are the most common readers.<sup>29</sup>

The idea of NfR in general is not to create an immediate accountability of enterprises for human rights related actions. NfR does not mainly refer to a compensation for human rights violations, but rather aims to establish human rights protection as a core business concern.<sup>30</sup> Nevertheless, NfR is not just a tool to prepare the way for, for example, civil actions. It is an instrument of strengthening human rights through a process of internal self-reflexion.

The following section will introduce a case study on food speculation to examine NfR's actual shortcomings and its potential for managing regime collisions between the economic system and global (social, cultural, and economic) human rights.

### Case study: food speculation, stakeholder engagement and NfR in practice

In 2013, Oxfam Germany accused several German companies, inter alia the Allianz Group, of making profit with financial transactions that bear a significant risk to cause hunger in the world.<sup>31</sup> The Allianz Group appears to be a major player in the field of food commodities speculation. Oxfam Germany states that in 2011 the Allianz Group and its subsidiaries held 5 commodity funds with an overall fixed asset of 18.44 billion euros, of which approximately 6.24 billion euros cover agricultural commodities.<sup>32</sup>

<sup>28</sup> See Human Rights Reporting and Assurance Frameworks Initiative (RAFI), 'Draft UN Guiding Principles Reporting Framework', p. 1.

<sup>29</sup> For further information on the readers' perspectives on sustainability reporting see v. Wensen, Broer, Klein, and Knopf, 'The State of Play in Sustainability Reporting in the EU', pp. 85ff.

<sup>30</sup> Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union', p. 75, paragraph 232.

<sup>31</sup> Oxfam Germany, 'Mit Essen Spielt Man Nicht!'; also see Oxfam Germany, 'Oxfam Hintergrundpapier, Hungerroulette'.

<sup>32</sup> Oxfam Germany, 'Mit Essen Spielt Man Nicht!', pp. 30ff.



In March 2012, Oxfam Germany contacted the Allianz Group and asked for a statement on the connection between speculation on agricultural commodities and global food prices.<sup>33</sup> The Allianz Group responded to the request by stating that their investments do not affect the demand on the physical markets and therefore do not jack up prices of agricultural commodities.<sup>34</sup> Furthermore, the Allianz Group and Oxfam Germany held several meetings in which the Allianz Group tried to refute Oxfam's allegations. In an open letter Jay Ralph, member of the board of the Allianz SE and chairman of the Environmental, Social and Governance Board of the Allianz SE, defended his company against persistent criticism.<sup>35</sup> In order to defend itself, the Allianz Group referred to internal audits and investigations that show that their business activities do not have a negative impact on food prices. At the same time, the Allianz Group refused to provide or publish its internal information.<sup>36</sup>

The Allianz Group reports on non-financial information on the basis of the GRI Guidelines. The sustainability report of 2012 reacts to the allegations by several NGOs in the form of an interview with the CEO of the Allianz SE, Michael Diekmann:

#### Question:

'In 2012, NGOs criticized banks, hedge funds and insurance companies for investing in agricultural commodities. Does Allianz view that criticism as an occasion to rethink its investments?'

#### Answer M. Diekmann:

'We did review those investments. We don't invest in agricultural commodities, but serve farmers and buyers as a risk partner in the futures market (where only price risks are traded). In return for a premium, we take on the risk posed by price volatility in the spot markets (where commodities are later traded). In that way, we ensure a reliable income

<sup>33</sup> Ibid. <sup>34</sup> Ibid.

<sup>35</sup> Ralph, 'Offener Brief an Oxfam', (15 October 2013), [www.allianz.com/de/presse/news/unternehmen/standpunkte/news\\_2013-10-14.html](http://www.allianz.com/de/presse/news/unternehmen/standpunkte/news_2013-10-14.html).

<sup>36</sup> Schiessl, 'Agrarrohstoffe: Streit über die Spekulations-Studie', *Spiegel-Online*, (3 February 2013), [www.spiegel.de/wirtschaft/flasbeck-gegen-agrarspekulation-a-880775.html](http://www.spiegel.de/wirtschaft/flasbeck-gegen-agrarspekulation-a-880775.html); Kwasniewski, 'Nahrungsmittelinvestments: Allianz wehrt sich gegen Spekulationswürfe', *Spiegel-Online*, (15 October 2013), [www.spiegel.de/wirtschaft/unternehmen/allianz-wehrt-sich-gegen-vorwuerfe-der-nahrungsmittelspekulationen-a-928029.html](http://www.spiegel.de/wirtschaft/unternehmen/allianz-wehrt-sich-gegen-vorwuerfe-der-nahrungsmittelspekulationen-a-928029.html).

for farmers and reliable prices for buyers. In those operations we don't need to 'bet on high prices', because we can earn our risk premium even if prices are low. We believe the criticism of Allianz on this topic is unjustified. But I must also say that it has raised our awareness of the problem. In dialogue with experts and NGOs, we want to find solutions that will help us address undisputed causes of hunger'.<sup>37</sup>

Oxfam Germany states that until now the Allianz Group has not changed its activities in this field. In November 2013, Foodwatch submitted an analysis in response to studies in favour of the position the Allianz Group and other companies involved in food speculations. It concludes that speculation on agricultural commodities is quite likely to have negative impacts on food prices.<sup>38</sup> Meanwhile, Foodwatch published a 'for internal use only' working paper by the Allianz Group, which concludes that 'taking into consideration the huge influx of funds and non-traditional participants into commodity markets, it cannot be totally dismissed, that speculation at least supports excessive price developments'.<sup>39</sup>

### **Shortcomings of NfR in practice: does NfR improve business behaviour?**

The fact that actual NfR initiatives are very praxis orientated makes their frameworks generally a practical tool for companies to disclose non-financial information. There is hardly any doubt that elaborating a report makes companies in some way reflect the impacts of their activities on human rights. To manage writing a report, corporations have to establish a 'task force' or a 'working group' that needs to communicate with every relevant internal actor and has to

<sup>37</sup> Allianz Group, 'Sustainability Factbook 2012', (2013), [www.allianz.com/v\\_1363290088000/media/responsibility/documents/ALLIANZ\\_Sustainability\\_Factbook.pdf](http://www.allianz.com/v_1363290088000/media/responsibility/documents/ALLIANZ_Sustainability_Factbook.pdf), p. 3.

<sup>38</sup> On the controversial discussion between foodwatch and Ingo Pies et al. who argue that speculation on agricultural commodities has no impact on food prices, see foodwatch, 'foodwatch-Argumentationspapier zur Studie "Finanzspekulation und Nahrungsmittelpreise" von Prof. Hans-Heinrich Bass'; Bass, 'Finanzspekulation und Nahrungsmittelpreise: Anmerkungen zum Stand der Forschung'; Pies and Will, 'Finanzspekulation mit Agrarrohstoffen'; Pies and Glauben, 'Wissenschaftliche Stellungnahme zum Argumentationspapier von Foodwatch'.

<sup>39</sup> Allianz Group, 'Working Paper: Is Speculation to Blame for Rising Food Prices?', p. 11.

examine almost all sectors of the company.<sup>40</sup> In addition, the working group has to explore internal structures (governance), supply chains, subsidiaries and their activities. Therefore, writing a sustainability report necessarily promotes a company's awareness regarding internal structures and partnerships that are relevant for human rights related impacts.

Nevertheless, the case study shows that the current NfR in practice often fails to achieve its objectives. Regarding the allegations made by Oxfam Germany, the Allianz Group reports that they reviewed the allegations and that they do not invest in agricultural commodities. Major questions that are components of common reporting frameworks were left unanswered:

How did the company assess the alleged impacts?<sup>41</sup> What were the findings of the evitable assessments?<sup>42</sup> How does the company integrate its findings into its decision-making processes regarding its further actions?<sup>43</sup> How does the company address tensions between the identified risks and other business objectives?<sup>44</sup> What exactly has the company done to address the risk?<sup>45</sup> How does the company address individuals, groups or communities concerns and complaints?<sup>46</sup>

The Allianz Group did not address the allegations in detail. Even though it turned out that there were internal studies that delivered explicit results, they did not report how exactly they assessed the alleged impacts

<sup>40</sup> For the internal challenges of CSR measures to a company see Scherer, Palazzo, and Seidl, 'Managing Legitimacy in Complex and Heterogeneous Environments'.

<sup>41</sup> See RAFI, 'Draft UN Guiding Principles Reporting Framework', Part C, pp. 11ff.; GRI, 'G4 Sustainability Reporting Guidelines', G4–pp. 24ff. (Stakeholder Engagement), pp. 29–30, G4–pp. 34ff. (Governance), pp. 36ff., G4–DMA, p. 46, G4–HR9 (Human Rights Assessments), p. 74, G4–HR12 (Human Rights Grievance Mechanisms), p. 75.

<sup>42</sup> See RAFI, 'Draft UN Guiding Principles Reporting Framework', Part B, C, pp. 11ff.; GRI, 'G4 Sustainability Reporting Guidelines', G4–pp. 24ff. (Stakeholder Engagement), pp. 29–30, G4–pp. 34ff. (Governance), pp. 36ff.

<sup>43</sup> Ibid.

<sup>44</sup> See RAFI, 'Draft UN Guiding Principles Reporting Framework', Part C4.2, p. 12; GRI, 'G4 Sustainability Reporting Guidelines', G4–pp. 24ff. (Stakeholder Engagement), pp. 29–30, G4–pp. 34ff. (Governance), pp. 36ff.

<sup>45</sup> See RAFI, 'Draft UN Guiding Principles Reporting Framework', Part C4, p. 12; GRI, 'G4 Sustainability Reporting Guidelines', G4–pp. 24ff. (Stakeholder Engagement), pp. 29–30, G4–pp. 34ff. (Governance), pp. 36ff.

<sup>46</sup> See RAFI, 'Draft UN Guiding Principles Reporting Framework', Part C2, pp. 11–2, C6, p. 13; GRI, 'G4 Sustainability Reporting Guidelines', G4–pp. 24ff. (Stakeholder Engagement), pp. 29–30, G4–pp. 34ff. (Governance), pp. 36ff., G4–HR12 (Human Rights Grievance Mechanisms), p. 75.

(especially regarding the involved sections and departments of the company) and what findings were made. The statement that they reviewed the allegations does not contribute to transparency. It is not comprehensible, if the company actually reviewed the allegations and what impacts these reviews had on further activities and decision-making processes. There was no information on the internal praxis in dealing with the tensions between the identified risks for the increase of food prices and expected profits.

The reporting practice of NfR brings up the question of whether NfR does actually improve business behaviour. Do companies actually take into account human rights in decision-making processes? Rob Gray's answer to these questions is: 'no-one can know – but it is probable'.<sup>47</sup> Because there are no monitoring and evaluation mechanisms and since the reporting requirements are too frail for 'greenwashing' (i.e., that companies often misuse their reports to create a false 'green image') the information given by participating companies cannot be verified and there is no guarantee that the information is comprehensive. Therefore, due to a lack of transparency the grade of the implementation of human rights in the internal structures and processes remains unclear.

Apart from the case study, many stakeholders argue that companies often misuse their reports to create a false 'green image' ('greenwashing'). William S. Laufer states that the emergence of the term 'greenwashing' reflects

an increasing apprehension that at least some corporations creatively manage their reputations with the public, financial community and regulators, so as to hide deviance, deflect attributions of fault, obscure the nature of the problem or allegation, reattribute blame, ensure an entity's reputation and, finally, seek to appear in a leadership position.<sup>48</sup>

Some companies 'engage in complex strategies and counter strategies that serve to shift the focus and attention away from the firm, create confusion, undermine credibility, criticise viable alternatives, and

<sup>47</sup> Gray, 'Does Sustainability Reporting Improve Corporate Behaviour?', p. 82.

<sup>48</sup> Laufer, 'Social Accountability and Corporate Greenwashing', p. 255; see also Deegan and Rankin, 'Do Australian companies report environmental news objectively?'; e.g. Boiral argues that sustainability reports (in this case under the A and A+ GRI standard, which generally is said to be the strictest scheme in the field of reporting standards) 'can be viewed as simulacra that camouflage real sustainable-development problems, presenting an idealized version of company situations' (Boiral, 'Sustainability Reports as Simulacra?', p. 1061). For deficiencies in the UNGC COP framework also see Deva, *Regulating Corporate Human Rights Violations*, pp. 96ff.

deceptively posture firm objectives, commitments, and accomplishments'.<sup>49</sup> 'Greenwashing', therefore, goes along with the possibility of reporting organisations to decide freely which information to publish and how to design the reports. While common guidelines use specific indicators to guide the participating companies, the frameworks still give companies wide latitude on how to shape the reports with the effect that reports are often designed like advertising brochures or catalogues,<sup>50</sup> containing only selected information or lacking relevant information and serving as a platform for presenting 'green' products or technologies.<sup>51</sup>

For these reasons, stakeholders further criticise that the reports are often low in credibility, comparability, and comprehensiveness and therefore of little use in practice.<sup>52</sup> They tend to be difficult to understand, are highly inconsistent and provide extensive unnecessary information, whilst failing to provide the vital facts.<sup>53</sup> Some potential readers stress that there is a high degree of mistrust of the companies' intentions and that they prefer direct means of communication with companies to obtain the required information.<sup>54</sup> NGOs, affected communities or groups and civil society in general see transparency, standardisation, completeness, external assurance, a mandatory requirement and supervision mechanisms for NfR as major aspects for improving current NfR.<sup>55</sup>

Finally, the current lack of unsustainability and the severe collisions in the relationship 'business and human rights' suggest that either companies are still within a initial phase regarding the internalisation of human rights, or company activities actually do not consider human

<sup>49</sup> Laufer, 'Social Accountability and Corporate Greenwashing', p. 255.

<sup>50</sup> See for example H&M's latest sustainability report. The report is designed like a fashion catalogue and, therefore, contains a lot of pictures, animations, and images of H&M's products or models presenting H&M's products: H&M, 'Conscious Actions – Sustainability Report 2013', (2014), <http://sustainability.hm.com/en/sustainability/downloads-resources/reports/sustainability-reports.html>.

<sup>51</sup> See e.g. the studies of Skouloudisa, Evangelinos, and Kourmouzis, 'Assessing non-financial reports according to the Global Reporting Initiative guidelines: evidence from Greece'; Chapman and Milne, 'The triple bottom line: how New Zealand companies measure up'; Mahoney, Thorne, Cecil, and LaGore, 'A research note on standalone corporate social responsibility reports: Signaling or greenwashing?'.

<sup>52</sup> Tilt, 'The Influence of External Pressure Groups on Corporate Social Disclosure', p. 63.

<sup>53</sup> European Coalition for Corporate Justice (ECCJ), 'EU Legislation on Non-financial Reporting by Companies', p. 1.

<sup>54</sup> v. Wensen, Broer, Klein, and Knopf, 'The State of Play in Sustainability Reporting in the EU', p. 86.

<sup>55</sup> Ibid., pp. 93ff.

rights matters in their decision making processes at all. If the former is the case, the only way to improve the current (unsatisfactory) situation is to make structures and processes transparent and open to a method that will promote and achieve an internalisation of human rights in business conduct. If the latter is the case, then ‘company disclosure needs to reflect this so that we can discount the empty rhetoric’ and radically reconstruct the given structures of binding business to human rights.<sup>56</sup>

### The potential of NfR

If one considers that even the best reporting standard cannot guarantee that the disclosed information is comprehensive, credible, and misused for ‘greenwashing’ then what is the future for NfR and can it contribute to tie business to human rights obligations?

#### *Promoting self-reflexion through monitoring and enforcement mechanisms*

Taking into account the small number of reporting companies and the vast amount of structural violations of human rights, it can be questioned if voluntary initiatives like the GRI or concepts that promote voluntarism in general, like CSR, are an expression of actual self-restraint in terms of self-constitutionalisation of the economic system.<sup>57</sup>

Anyhow, with reference to systems theory it can be argued that only the economic system or business actors decide whether they adjust their communications in favour of their systems’ social environment. Because the systems remain autopoietic<sup>58</sup> and, therefore, internal communications only refer to previous internal communications; the difficult task to reciprocally harmonise the function of a social system with its output in favour of its social environment can only be accomplished by a system-internal reflexion.<sup>59</sup> This system-internal reflexion can be initiated from the outside of a system, but it cannot be replaced.<sup>60</sup> Gunther Teubner states that these initiations can only be successful if they orientate

<sup>56</sup> See Gray, ‘Does Sustainability Reporting Improve Corporate Behaviour?’, p. 82.

<sup>57</sup> For the concept of self-constitutionalisation of business enterprises see Teubner, ‘Selbst-Konstitutionalisierung transnationaler Unternehmen?’, for the conditions and chances of a human rights based self-restraint of economic regimes see Teubner, ‘Die anonyme Matrix’.

<sup>58</sup> Luhmann, *Die Gesellschaft der Gesellschaft*, p. 757.

<sup>59</sup> Teubner, *Verfassungsfragmente*, p. 134. <sup>60</sup> Ibid.

themselves on the system's ways of self-change and aim to give impulses that can be translated into inner growth processes.<sup>61</sup> The task would be to combine massive external pressure and irritation with intrinsic changes.<sup>62</sup>

This very much describes the idea of an NfR framework equipped with a proper monitoring and enforcement system. Such a framework could serve to improve the internalisation of human rights matters within the structures of business enterprises. Internal learning effects are combined with external pressure, assistance and guidance. NfR would institutionalise a mandatory framework for self-reflexion within the economic system.<sup>63</sup>

Regarding a company's internal self-reflexion, a reporting procedure with a monitoring and enforcement mechanism would have advantages over common individual complaints procedures in several ways.

First, while individual complaints procedures only cover individual cases, reporting procedures can address structural human rights problems where it is difficult to identify victims of misconduct or to prove causality between misconduct and affected people.<sup>64</sup> Second, decisions or findings only have legal validity for representational facts, and access of a specific conflict to, for example, civil courts, and often depends on contingencies, while in report procedures continuous negotiations can be held on specific cases and/or structural shortcomings that may lead to a process of appropriation and internalisation of human rights matters within the internal structures of an involved company.<sup>65</sup> Third, monitoring and enforcement bodies could have several options on how to react to misconduct: They could react to the reports by expressing concerns about corporate conduct or concrete suggestions/proposals with respect to specific matters. In contrast to individual complaint procedures, reporting procedures are characterised by argumentative debates on social struggles, not by ruling specific problems.<sup>66</sup> Through

<sup>61</sup> Ibid., pp. 134–5      <sup>62</sup> Ibid., p. 135.

<sup>63</sup> See Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness', who refers to Teubner, 'Reflexives Recht'.

<sup>64</sup> Davy, 'Welche rechtlichen Grundregeln müssen für einen wirksamen Menschenrechtsschutz gelten?', pp. 255–6.

<sup>65</sup> Ibid., pp. 255, 258.

<sup>66</sup> Fischer-Lescano, 'Der Kampf um die Internetverfassung', p. 968.

follow-up procedures,<sup>67</sup> committees could pursue the further implementation of the previously communicated concerns and suggestions.

Because of the lack of evaluation or monitoring mechanisms in actual NfR, a direct response to the single reports within the reporting system is not possible. There is no guarantee that reports are exhaustive and there is no possibility to follow-up and efficiently support further actions. Reporting companies receive no feedback and there is no room for argumentative debates – a specific and individual learning process is not possible. Therefore, it is up to the companies to evaluate, recondition and incorporate report-related findings. The present case study proves that the learning factor for corporations is very low. A reporting procedure directed by a monitoring body could have served as a platform to debate Oxfam Germany's allegations, to evaluate the actions of the Allianz Group that have been taken to assess the alleged impacts and to consult on solutions to settle the present conflict.

On that note, for financial reporting Hong Phu Dao very rightly pointed out that 'a high quality financial reporting requirement . . . requires also a mechanism to oversee the appropriate application of the standards' and it 'depends both on the quality of accounting standards and the effectiveness of regulatory enforcement of these standards' because 'in the absence of adequate enforcement, the accounting rules may remain simply requirements on paper'.<sup>68</sup>

### *Inclusion of civil society in monitoring and enforcement mechanisms*

Another major shortcoming of actual NfR is the fact that it does not deliver a proper forum for stakeholders (especially for civil society) to communicate criticism towards companies. Currently, the only way for NGOs to influence NfR, for example, under the GRI, is to take part in the

<sup>67</sup> For the follow up procedures within the UN state report framework, especially the inclusion of NGOs in this process see Committee on Economic, Social and Cultural Rights (CESCR), 'Report on the Twentieth and Twenty-First Sessions', E/2000/22, E/C.12/1999/11, (2001), paragraph 38ff.; CESCR, 'Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights – NGO participation in the activities of the Committee on Economic, Social and Cultural Rights', E/C.12/2000/6 of 7 July 2000, paragraph 25ff.

<sup>68</sup> Dao, 'Monitoring Compliance with IFRS', p. 108.



GRI's 'development process'<sup>69</sup> or the 'monitoring program'.<sup>70</sup> Both options have in common that the subject of negotiation is the configuration of the Guidelines and not the reports themselves. That is one reason, why in the present case no NGO explicitly referred to the Allianz Group's sustainability report. The report actually played no role in dealing with the conflict.

Experiences from the UN-based state reporting procedures<sup>71</sup> have shown that the inclusion of civil society in the monitoring mechanisms is a very effective tool to address misconduct. The inclusion of civil society in the reporting, monitoring and follow-up process would significantly increase the extent of external pressure. By giving civil society a tool to scandalise, directly address and making public misconduct<sup>72</sup> towards the company or group concerned and to import these concerns into a process of evaluation, specific impacts and incidents as well as issues of general relevance can be addressed. Institutionalised arenas for hosting conflicts between civil society and business enterprises in general would increase societies' democratic control over the economic system.

The inclusion of civil society as well as other stakeholders can be established by giving NGOs the possibility to submit so-called shadow reports<sup>73</sup> or by incorporating counter-accounting.<sup>74</sup> Thereby, reporting companies could be confronted with specific incidents, negative business impacts or business activities-related issues. In turn, the monitoring

<sup>69</sup> See the Homepage of the GRI, [www.globalreporting.org/standards/g4/g4-developments/Pages/default.aspx](http://www.globalreporting.org/standards/g4/g4-developments/Pages/default.aspx)

<sup>70</sup> See the Homepage of the GRI, [www.globalreporting.org/standards/g4/Pages/G4monitoring.aspx](http://www.globalreporting.org/standards/g4/Pages/G4monitoring.aspx).

<sup>71</sup> For an overview of the UN state reporting system see Kretzmer, 'Human Rights, State Reports', with further references; Keller, 'Reporting Systems'.

<sup>72</sup> Liese, 'Epistula (non) Erubescit', pp. 59–60.

<sup>73</sup> For the role of NGOs in the monitoring system of Human Right Treaty Bodies see Clapham, 'UN Human Rights Reporting Procedures: An NGO Perspective'; Klein, *The Monitoring System of Human Rights Treaty Obligations*; Brett, 'The Role of NGOs – An Overview'.

<sup>74</sup> Boiral defines counter-accounting 'as the process of identifying and reporting information on organisations' significant economic, environmental and social issues that comes from external or unofficial sources (expert reports, research papers, online journals, studies from NGOs, government publications, legal proceedings, etc.) in view of verifying, complementing or countering organisations' official reports on their performance and achievements' (Boiral, 'Sustainability Reports as Simulacra?', p. 1037). For the Role of civil society and stakeholders in the field of corporate accounting also see O'Dwyer, 'Stakeholder democracy'; Adams, 'The ethical, social and environmental reporting performance portrayal gap'; Gallahof, Haslam, Monk, and Roberts, 'The emancipatory potential of online reporting'.

system could respond to the information given by the companies and the NGOs by handing out recommendations or stressing the companies' obligation to report on certain aspects.

Therefore, besides the implementation of monitoring and enforcement mechanisms, a major task for actual NfR is to effectively include civil society by providing a right to claim transparency in specific fields of business activities or the possibility to actively influence the evaluation process. Ingeborg Maus has noted that to avoid replication of factual positions of power in negotiating positions, which can be observed in actual NfR regarding the problem of 'greenwashing', it is essential to empower the underprivileged positions by mandatory legal mechanisms.<sup>75</sup> Spaces of autonomy have to be legally ensured by legally framed negotiating positions.<sup>76</sup>

*Legal foundation for introducing monitoring and  
enforcement mechanisms*

To sum up, NfR has the potential to serve as an effective means of identifying and tackling collisions of human rights regimes and the economic system. But what are the odds that NfR will achieve its full potential? Amongst private reporting initiatives there are no plans to bring into focus better monitoring and enforcement of the reporting process. The most significant obstacle for introducing proper NfR legislation is the lack of political will. Some Member States, for example, Germany, have explicitly expressed rejection towards the plans of the EU to pass mandatory NfR:

The federal government explicitly militates against new legal disclosure on social and ecological information in the context of CSR. Such obligations would be a renunciation of the principle of voluntariness and would be accompanied by an extensive administrative burden, especially for small and medium size companies.<sup>77</sup>

<sup>75</sup> See Maus, 'Perspektiven "reflexiven Rechts" im Kontext gegenwärtiger Deregulierungstendenzen'.

<sup>76</sup> Ibid., p. 404.

<sup>77</sup> Positionspapier der Bundesregierung zur Mitteilung der Europäischen Kommission, 'Eine neue EU-Strategie (2011–14) für die soziale Verantwortung der Unternehmen (CSR)', (KOM 2011) 681 endg., (18 November 2011), (translation by author).

In contrast to this, there are concrete points of contact for the introduction of monitoring and enforcement mechanisms both in the EU's Directive itself and in international law.

To refute the reservations of some states, one could first refer to states' obligations in international law with respect to regulating private actors' activities. The Committee on Economic, Social and Cultural Rights (CESCR) has repeatedly stated that states have an obligation to

effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations. As the Committee has repeatedly explained, non-compliance with this obligation can come through action or inaction . . . States Parties should also take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.<sup>78</sup>

The UN Guiding Principles on Business and Human Rights,<sup>79</sup> proposed by the UN Special Representative on business & human rights John Ruggie, confirm the practice of the committee. The first Principle clearly stresses that states 'must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish, and redress such abuse through effective policies, legislation, regulations, and adjudication'. Like the CESCR, the Guiding Principles clearly stress the importance of steps to prevent companies from violating human rights. Principle three points out that states should 'provide

<sup>78</sup> Committee on Economic, Social and Cultural Rights (CESCR), 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights', E/C.12/2011/1 of 11 May 2011; also see CESCR, 'General Comment No. 14', E/C.12/2000/4 of 11 August 2000, paragraph 39; CESCR, 'Concluding Observation: Germany', E/C.12/DEU/CO/5 of 12 July 2011, paragraph 10; The 'Maastricht Principles on Extraterritorial Obligations in the Area of ESC Rights' (De Schutter, Eide, et al., 'Commentary') refer to the practice of the Committee and other human rights bodies when stating a state obligation to regulate private conduct (Principle 24) and states must adopt and enforce measures to protect economic, social, and cultural rights 'as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned' (Principle 25).

<sup>79</sup> UN Office of the High Commissioner on Human Rights, 'UN Guiding Principles on Business and Human Rights', HR/PUB/11/04, (2011).

effective guidance to business enterprises on how to respect human rights throughout their operations' and 'encourage, or where appropriate require, business enterprises to communicate how they address their human rights impacts' to comply with their duty to protect human rights. Reporting procedures, if equipped with a monitoring mechanism, are an effective tool to guide the reporting party to compliance.

In this respect, international human rights law obligates states<sup>80</sup> to take effective legislative steps to regulate corporations' conduct with regard to the progressive realisation of rights, i.e., as recognised in the CESCR. On the one hand, it can be argued that states in some respect have a margin of appreciation in the area of extraterritorial jurisdiction over corporate human rights abuses and, therefore, the boundaries between what is legally binding and what is politically opportune are often blurred.<sup>81</sup> On the other hand, there is obviously a lack of regulation in this field, especially when it comes to monitoring and enforcement. There is no doubt that proper NfR can be rated as an effective tool to improve corporations' behaviour as regards human rights. To date, states such as Germany<sup>82</sup> have not taken adequate legal or political steps to prevent their own citizens and national entities from violating economic, social and cultural rights in other countries. Appropriate and effective legislative steps, for example, proper mandatory NfR, are long overdue.

The Directive supports this assumption. It contains a passage that can only be understood as a request to the Member States to create procedures to monitor and enforce the disclosure of non-financial information:

<sup>80</sup> For the question whether EU is obliged by international human rights codifications see Fischer-Lescano, *Human Rights in Times of Austerity*, pp. 23ff. On the relationship between the EU and member states international human rights obligations see Ahmed and de Jesús Butler, 'The European Union and Human Rights'; The Regional Office for Europe of the UN High Commissioner for Human Rights, 'The EU and International Human Rights Law'.

<sup>81</sup> Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union', p. 77, paragraph 240; Krennerich, *Soziale Menschenrechte*, pp. 106, 361–2; CESCR, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights', E/C.12/2011/1 of 11 May 2011; also see CESCR, 'General Comment No. 14', E/C.12/2000/4 of 11 August 2000, paragraph 39.

<sup>82</sup> Germanwatch and Miseror demand the German Government to comply with the European Commission's request ('Communication: A renewed EU strategy 2011–14 for Corporate Social Responsibility', COM (2011) 681 final of 25 October 2011) to establish a plan for the implementation of the UN-Guiding Principles on Business and Human Rights (Germanwatch and Miseror, 'Nationaler Aktionsplan zur Umsetzung der UN-Leitprinzipien für Wirtschaft und Menschenrechte').

Member States should ensure that adequate and effective means exist to guarantee disclosure of non-financial information by undertakings in compliance with this Directive. To that end, Member States should ensure that effective national procedures are in place to enforce compliance with the obligations laid down by this Directive, and that those procedures are available to all persons and legal entities having a legitimate interest, in accordance with national law, in ensuring that the provisions of this Directive are respected.<sup>83</sup>

For the enforcement of the reporting obligation itself it would be sufficient to simply sanction an omission. To ensure that the content and substance of the reports are in accordance with the Directives' obligations, it requires more than that. Therefore, the Directive advises the Member States to introduce 'effective national procedures' to enforce the compliance with the Directives' demands. The previous examination illustrates that to effectively ensure a compliance with the reporting obligations, it is indispensable to implement monitoring and enforcement mechanisms that directly deal with the reports and their content. The EU's Directive also supports the proposal to open monitoring and enforcement mechanisms to affected stakeholders by stating that these national procedures should be available to all persons and legal entities that have a legitimate interest in ensuring the compliance with the reporting obligations.

### Perspectives for NfR

NfR is only one strategy within a plethora of approaches that try to advance corporate accountability and therefore generally are aimed at preserving the autonomy of social systems or regimes against the expansive drive of the economic system.<sup>84</sup> Sufficient NfR legislation is an instrument with a unique potential to influence the rationality of the economic system and its actors. It can prepare the ground for countering economic forces that restrain or block the fulfilment of (economic, social, and cultural) human rights.<sup>85</sup> The case study pointed out that reports on non-financial information need to be embedded in a procedure that is open to relevant stakeholders and allows

<sup>83</sup> Directive 2014/95/EU of 22 October 2014.

<sup>84</sup> For an overview of strategies of implementation on the institutional level (within the economic system), the national level, and the international level see Deva, *Regulating Corporate Human Rights Violations*, pp. 200ff.

<sup>85</sup> See Freeman, 'Conclusion: Reflections on the Theory and Practice of Economic and Social Rights', p. 386.

continuous negotiations about business conduct and the internal organisation of dealing with human rights related misconduct.

However, the proposed development of NfR would face considerable challenges that should be considered when interpreting the results presented here. Therefore, this paper should be seen as exploratory – serving as an impetus for further research that will widen the perspective on the development of NfR.

First, the precise arrangement of the proposed monitoring and enforcement mechanisms is a crucial question. Possible solutions vary from national to regional or global forms of organisation. The adjacency of regional actors to ‘local’ companies speaks in favour of a national or regional solution.

Second, the huge amount of potential reporters would be a major task to manage. The European Commission estimates that there are approximately 42,000 ‘large’ companies operating in the EU. This significant fact raises the question if there could be a monitoring system that would be able to evaluate the huge amount of reports. In this regard, actual practices in fR could serve as a role model or even a point of contact. The practice of, for example, European and German monitoring and enforcement bodies in the field of fR presents an effective way to deal with the problem of the huge amount of potential reporters. A concrete monitoring and enforcement procedure will be launched on two occasions: First, there is an ad-hoc procedure that begins when a stakeholder informs the body about a specific misconduct. Second, there is a progressive proceeding of randomly evaluating reports of the obligated companies. In the case of Germany, there are two bodies that monitor and enforce the reporting obligation. The body of the first instance is competent for the actual monitoring and evaluation process. It is set up as a private association and composed of specialised representatives of all relevant stakeholders in the field of fR. The body of the second instance is governmental and capable of imposing sanctions and other mandatory orders on a reviewed company.<sup>86</sup>

Financial Reporting in practice demonstrates that selective procedures and a smart mix of governmental and private control in NfR can be the key for implementing an effective monitoring and enforcement mechanism.

<sup>86</sup> For the organisation of the German financial supervisory system see Bockmann, *Internationale Koordinierung nationaler Enforcement-Aktivitäten*. For the European financial supervisory system see Wymeersch, ‘The reforms of the European Financial Supervisory System’.

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